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In the
Supreme Court of the United States

OCTOBER TERM, 1968

No. 446

LOUIS J. TAGLIANETTI,
PETITIONER,

v.

UNITED STATES OF AMERICA.
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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District of Rhode Island, entered on August 16, 1966, and October 4, 1967, (Appendix A, Infra., (p. 29) are not officially reported. The opinion of the United States Court of Appeals for the First Circuit entered July 18, 1968, (Appendix B, Infra., (p. 47) is thus far unreported; the memorandum and order of the Circuit Court concerning the remand for post conviction hearing, dated January 17, 1967, is also reprinted and forms part of Appendix B, Infra., (p. 68).

Jurisdiction

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1).

Statutes Involved

The following statutory provisions are set forth in Appendix C, Infra., (p. 70); 26 United States Code 7201 and 18 United States Code 3500.

Questions Presented

1. What quantum of proof is required, in a cash expenditures prosecution in order to establish opening and closing in net worth for each indictment year?

2. Is a putative defendant, under investigation by the Intelligence Division of Internal Revenue Service, entitled to be advised of his right to counsel prior to interrogation?

3. Was the defendant in this case entitled to be so advised in view of the misleading statement by the

agents of the Internal Revenue Service as to the identity of the tax years under investigation?

4. Does the court have a right to receive in camera the fruits of illegal surveillance obtained by electronic means and by trespass, without any disclosure of those fruits to the defense?

5. Does a direct intrusion by wire tapping into the attorney-client relationship in itself require a retrial of the case?

Statement of the Case

This is the appeal of defendant Louis J. Taglianetti from an order of the United States District Court for the District of Rhode Island denying defendant's alternative motion for new trial or acquittal, and from a subsequent decision of the district court rendered in a post conviction hearing and from the decision of the United States Court of Appeals for the First Circuit.

The case was tried to a jury before Chief Judge Day from April 20 to April 28, 1966. At the conclusion of all the evidence, the jury returned a verdict finding defendant guilty of income tax avasion for 1956, 1957, and 1958 in violation of 26 U.S.C., Sec. 7201.

The government tried the case on the cash expenditures theory (R.A. 32). Mr. Taglianetti was notified by letter of October 2, 1961 to appear for an interview at the Intelligence Division of the Internal Revenue Service on October 6, 1961. This letter was signed by Special Agent O'Brien, Intelligence Division, who entered the investigation between June 12, 1961 and October 2, 1961. (R.A. 189-192). At this interview Mr. Taglianetti was told that his income tax for 1959 and 1960 was being investigated. Government Ex. 32

(R.A. 195 & 731). At no time was Mr. Taglianetti advised that other years were under investigation (R.A. 319-320). Other interviews took place at the Intelligence Division of the Internal Revenue Service on April 23, February 9, February 12, May 2 and May 11, 1962. (R.A. 203-204). Transcripts of the October 6, 1961 and April 23, 1962 interviews are in evidence. (Ex. 32, 25). Memoranda of the February 9, February 12 and May 11, 1962 interviews were compiled by Special Agent O'Brien after each interview. (R.A. 317-318, 317, 303; Dft. Ex. A, B, C for identification). All interviews were part and parcel of the same investigation. (R. 192, 194, 195, 318, 327). Mr. Taglianetti was unrepresented throughout these interrogations, and was never advised that he had the right to have counsel present. (R. 327). It also appeared that Special Agent O'Brien had no memoranda indicating he had advised Mr. Taglianetti of his constitutional rights prior to the February 12, 1962 interview. (R. 304, 305). Mr. Taglianetti promised to appear at the May 11 and February 12, 1962 interviews. (R. 319-320).

The government introduced evidence of the various interviews through Special Agent O'Brien and Internal Revenue Agent Racca. (R. 193-198, 292-335, 180-188, 197-198).

At no time during the trial was evidence presented of the opening and closing net worth of the defendant for each of the indictment years.

Subsequent to conviction, and while the matter was pending on appeal, the government disclosed to this court that the Federal Bureau of Investigation had by means of trespass, installed a microphone at the place of business of a close business associate of the defendant; that on various occasions between 1962 and 1965, defendant's conversations were monitored by agents of the F.B.I.; and that certain of these conversations related to defendant's Internal Revenue case. The government requested a remand to the District

Court so that a full judicial determination could be made. The government's position in its request was clearly stated; it represented that since there was no attorney-client intrusion- *Black* v. *United States* (385 U.S. 26) need not be followed and a new trial was not automatic.

Prior to hearing the matter on its merits, the defense filed Motions for Discovery and Inspection, wherein it asked for all of the monitored conversations between the dates alleged. The court ordered such discovery as is indicated by Order Re: Motion for Discovery, March 8, 1967.

The data which is the subject of said order was unilaterally represented by the government to be all of the monitored conversations in which defendant participated, (R.A. 539). On March 20, 1967, a hearing was held at which time defendant moved for further discovery, see (R.A. 501-542). At this hearing defense attempted to show that the monitoring agents were unable to identify the defendant each and every time he was alleged to have spoken (see transcript R.A. 501-542). The government objected. The court took the material for an in camera inspection continuing the case to an indefinite date. (R.A. 527).

While the trial court inspected the logs and airtels [not furnished to defense] in camera, the government attempted to turn over to the defense other logs and airtels which it claimed to have overlooked. (See Defendant's Supplemental Motion for Discovery and Inspection R.A. 543-547). Defendant's Supplementary Motion was granted. Although it does not appear in the docket entries the trial court ruled that none of the material received by the court in camera contained any conversations of the defendant.

As a result of pre-hearing discovery, the defense made known to the District Court, the fact that there was indeed an intrusion to an attorney-client relationship (R.A. 550-551). The government was quick to alter its stated position

when it caused these facts to be made known by letter dated May 3, 1967 to the District Court and the Circuit Court of Appeals.

Trial in the post conviction phase commenced on May 9, 1967. F.B.I. agent James Dunn, Jr., was called to testify that he took part in the electronics surveillance (R.A. 553); that he took hand written notes while the tape recorder was recording (R.A. 555); that his notes were a summary of the conversations he heard (R.A. 555); that at the end of each day he would forward the logs (hand written notes) and the tapes to the Boston office, attention Mr. Kehoe, (F.B.I. agent in charge of electronic surveillance, (R.A. 555); that Government Exhibit 116, a log dated February 16, 1965 was made by him; that he overheard (R.A. 556) conversations between the defendant and attorney, Robert Crouchley (R.A. 557); that the length of the conversation with Mr. Crouchley lasted a maximum of two minutes (R.A. 558); that he recognized the defendant's voice (R.A. 558); that he did not know special agent Internal Revenue Service, James F. O'Brien (R.A. 560); that he did not know Mike Cortez, Chief of Intelligence Program, Providence, Rhode Island (R.A. 560); that he did not know Arthur McDeed of the Intelligence Department, Providence, Rhode Island (R.A. 561); that he [Dunn] had no recollection of the attorney-client conversation (R.A. 562); that F.B.I. agent Kehoe drafted all memoranda or airtels (R.A. 563); that he [Dunn] made the decision as to which conversations to monitor and which not to monitor on the tape (R.A. 564); that he had occasion to discuss the surveillance material with agent Repucci of the Providence Resident Agency (R.A. 567); that after the tape recording and Dunn's logs were sent to Boston he received memoranda which he read and initialed; that he [Dunn] never discussed the surveillance material outside a certain group of agents (R.A. 570).

John A. Varone, of defense counsel, testified that he was engaged by the defendant in March, 1963; that the only tax matter he represented the defendant on was on Indictment 6912 [Indictment years of the instant case], (R.A. 590); that in January of 1965 he was associated with Robert G. Crouchley in the practice of law (R.A. 592) that prior to January 5, 1965, he [Varone] and Crouchley worked jointly on almost every case that Mr. Varone had in his office (R.A. 592); that Mr. Crouchley was known to the defendant (R.A. 593); and that Crouchley had met the defendant on the same day in 1963 that attorney Varone had met the defendant; that the association with Attorney Crouchley lasted until October, 1965 (R.A. 593); that at the first meeting with the defendant, attorney Varone told the defendant that Crouchley was associated with him [Varone] and would assist with the preparation and trial of the case (R.A. 595); that he was incapacitated from attending to his law practice Jan. 5, 1965 to early 1966.

Attorney Robert Crouchley testified that during the years 1963 and 1964, he worked in one way or another on approximately two hundred cases which attorney Varone had in his office (R.A. 596); that, during the years 1963, 1964 and 1965, Crouchley worked in concert with attorney Varone on the Taglianetti tax evasion case (R.A. 596-597); that on October 21, 1964, Mr. Crouchley made an appearance on defendant's behalf in the Federal Court, District of Rhode Island, to inform the court that attorney Varone had been injured in an airplane crash on October 20, 1964, (R.A. 597, 598, 599, 600); that on January 5, 1965, he [Crouchley] learned Mr. Varone had been injured in an automobile accident (R.A. 601) that he [Crouchley] was instructed by Mr. Varone to handle "things in the office" (R.A. 602); that he [Crouchley] had contact with the defendant, Taglianetti, during the period of Mr. Varone's illness (R.A. 602); that other than the criminal prosecution during the years 1956-

1958, he [Crouchley] was not aware of any other income tax case involving the defendant (R.A. 603); that Crouchley talked to the defendant on the telephone approximately ten times in 1965; that he was the Robert Crouchley who talked with the defendant on February 15, 1965 on the telephone about the defendant's Internal Revenue case (R.A. 616).

Reasons For Granting The Writ

I.

Petitioner submits that in this case the United States Court of Appeals for the First Circuit has decided an important question of federal law, which ought properly to be settled by this court; and further that the decision of the Court of Appeals is in error. The initial question so presented deals with the quantum of proof necessary for the government successfully to maintain a cash expenditures prosecution. At the outset, it should be remarked that there can be no doubt but that as essential element of a cash expenditures case is proof of the defendant's opening and closing net worth for each indictment year. *Hoffman* v. *Commissioner of Internal Revenue,* 298 F.2d 784, 786-787 (3rd Cir. 1962); *United States* v. *Caserta,* 199 F.2d 905, 906 (3rd Cir. 1952).

The need for a beginning and end, of course, is to demonstrate that the defendant has not made expenditures from other assets accumulated through the years prior to the one for which he has been indicted. "The application of the cash expenditure method . . . . with neither a head nor a tail to it will not do." *Olinger* v. *Commissioner of Internal Revenue,* 234 F.2d 823, 824 (5th Cir. 1956). Without proving an opening and closing net worth the government leaves open the reasonable inference that the

defendant has accumulated assets from which he has made cash expenditures during the indictment year. *Brodella* v. *United States,* 184 F.2d 823-824 (6th Cir. 1950). The cases supporting the necessity for an opening net worth are many. Of particular significance is the cash receipts and expenditure case of *Ford* v. *United States,* 210 F.2d 313, 315 (5th Cir. 1954) where it is stated:

> "one of the most difficult matters of proof in such cases is to establish a satisfactory starting point at the beginning of the first of the tax periods included in the indictment, that is as applied to the present case, to negative the existence on January 1, 1945, of resources available to the defendant and his wife from which the excessive expenditures might have come. The government then has the further burden in such cases of proving that there were no gifts, devices (sic), or other non-taxable income which could have been used for the expenditures, and of proving large cash expenditures within each of the tax years considerably exceeding the taxpayer's accumulated cash resources plus reported income and which expenditures could not be otherwise accounted for than by finding that the taxpayer had received more taxable income than had been reported, and had willfully and knowingly filed or caused to be filed a false and fraudulent income tax return."

The opening and closing net worth must be clearly and accurately established by competent evidence.

> "In a criminal case . . . * * * net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence." "*Brodella* v. *United States,* (6th Cir., 1950), 184 F.2d 823,

825." "*Thomas* v. *Commissioner of Internal Revenue*, 232 F.2d 520, 524, (1st Cir. 1956)." "*United States* v. *Fenwick*, 177 F.2d 488 (7th Cir. 1949)".

Thomas proceeded on the net worth and expenditures theory. *Thomas, supra* 523. In the case at bar no evidence as to the defendant's net worth was adduced. Indeed, it appears as though an assumption was made that on January 1, 1956, defendant was devoid of all assets except for those items brought out at the trial. Such assumption and guesswork was the subject of the admonition of the Court of Appeals in *Thomas* when it stated:

> "If respondent [Commissioner of Internal Revenue] is to be permitted to make an arbitrary guess as to the proper figure for the cash on hand account, this would seem to be no reason as a general proposition why similar guesses should not be made as to each of the constituent elements comprising the taxpayers net worth. Under these circumstances the entire net worth technique becomes nothing but an elaborate accounting when lending a semblance of system and logic to a determination of deficiency which could have no greater validity than that original guesswork upon which it was based." *Thomas, supra* at 526.

In *Thomas,* the computation of net worth was agreed upon except for the amount of cash on hand at the beginning and end of each year. *Thomas, supra,* at 524. With respect to the cash on hand an assumption was made that the taxpayer had none as of January 1, 1943. *Thomas, supra,* at 524. In the case at bar the assumption is that Mr. Taglianetti had no other available assets from which he could derive cash to make expenditures during the indictment years.

In *United States* v. *Fenwick,* 177 F.2d 488, (7th Cir. 1949), the court held it reversible error for the government to assume defendant's net worth at the beginning of the first indictment year to be $50,829.06. *Fenwick, supra* at 490. In Fenwick there was at least an attempt to establish an opening net worth while in the case at bar the record is wholly barren of even an attempt to establish an opening net worth. With such a deficiency, proof beyond a reasonable doubt is impossible.

> "[W]here there is uncertainty as to whether all the assets of defendant are included in the government's computation of net worth, it follows that its computation cannot be relied on. Essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt." *Fenwick,* supra at 488.

It is defendant's position that even assuming, *arguendo,* that the evidence adduced shows he spent more money during the indictment years than his reported gross income, there is not one scintilla of evidence to show that said expenditures came out of current receipts *only* and not out of available assets acquired in prior years. This is so because there is absolutely no competent evidence which, in any way suffices to clearly and accurately establish the extent of defendant's prior assets at the beginning of any or all the indictment years; i.e., there is no opening net worth for January 1, 1956, 1957 or 1958.

> "If there is no established figure showing the source from which expenditures during the year can be made, or the complete lack of such a source, then there can be

no relevance to proof of expenditures during the year, no matter how large they may be . . ." *Dupree* v. *United States*, 218 F.2d 781, 784 (5th Cir. 1955), (citations omitted).

In *Bryan* v. *United States*, 175 F.2d 223 (5th Cir. 1949), the government sought to introduce evidence of the defendant's net assets owned at the beginning of the period in question through an auditor for the Bureau of Internal Revenue; *Bryan, supra* at 225. However, the auditor admitted that he did not know whether his computation contained *all* the assets of the defendant. *Bryan, supra* at 226. The court held that such a lack was fatal to the government's attempt to prove a *prima facie* case under the net worth and expenditures theory since it would have been possible for some of these unlisted assets to be used for cash expenditures during the indictment years. *Bryan, supra* at 227. In the case at bar no auditor for the Internal Revenue Service was presented by the government to establish defendant's opening net worth for each of the indictment years. There is nothing but a vacuum.

The Court of Appeals for the First Circuit, in its opinion in this case, concedes that the jury was not "apprised of the dollar value of each of the assets comprising appellant's opening net worth." The Court of Appeals further concedes that the government made no formal attempt to establish either an opening or a closing net worth for any of the indictment years. The record also demonstrates, although the Court of Appeals did not directly comment thereon, that the trial court failed to grant defendant's request to charge number 18, which read as follows:

"18. Unless the government has proven to you beyond a reasonable doubt the defendant's net-worth

situation at the beginning and end of each of the indictment years, then your verdict must be for the defendant.''

In short, the position adopted by the Court of Appeals—in disregard of and without reference to its prior decision in *Thomas,* supra—is that in the absence of evidence presented by the defense to show fluctuations in net worth so as to account for cash expenditures, then the jury may by inference, in the absence of formal proof of net worth, infer that payments are made out of current receipts only. This, in effect, changes the burden of proof in a case of this sort. Moreover, the loose rule so adopted by the Court of Appeals points up the lack of any truly definitive statement by this Supreme Court in connection with this method of prosecution. Your petitioner urges that the instant case is one in which binding guidelines might well be laid down by Your Honors as to the quantum of proof necessary in this situation. We consider applicable to this type of case the observation by the Supreme Court in *Holland* v. *United States,* 75 S. Ct. 127 at 131:

> 'The net worth method, it seems, has evolved from the final volley to the first shot in the Government's battle for revenue, and its use in the ordinary income-bracket cases greatly increases the chances for error.'

[1] We also consider equally applicable to a case like the one at bar the mandate of the Supreme Court in the same case stated as follows:

> 'While we cannot say that these pitfalls inherent in the net worth method foreclose its use, *they do require the exercise of great care and restraint.* The complexity of the problem is such that it cannot be met

merely by the application of general rules. Cf *Universal Camera Corp* v. *National Labor Relations Board,* 340 U.S. 474, 489, 71 S.Ct. 456, 465, 95 L. Ed. 456. Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system, which, though difficult for the prosecution to utilize, *is equally hard for the defendant to refute.* Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused. Appellate courts should review the cases bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.'

For these reasons, the action of the United States District in refusing to grant the requested instructions, and the action of both the District Court and the Circuit Court of Appeals in refusing to order a new trial for want of proof of opening and closing net worth, was clearly erroneous.

II.

It is the defendant's position that in the case at bar, he was deprived of his constitutional right to have counsel present at the interrogations which took place at the Intelligence Division of the Internal Revenue Service. In the well known and often quoted case of *Miranda* v. *Arizona,* (1966) 384 U.S. 436, it was held that during custodial interrogation the privilege against self-incrimination applied and that certain procedural safeguards must be applied. *Miranda, supra* at 479. Two courts have held the

safeguards of *Miranda* applicable in tax evasion cases. *United States* v. *Turzynski*, (N.D. Ill., E.D. 1967) 268 F. Supp. 877; *United States* v. *Schoenburg*, (1966 D. Ariz.) 19 AFTR 2d, 347 F. Supp. 847.

It is submitted that the rationale of *Miranda* is that the privilege against self-incrimination must be scrupulously protected during the adversary stages of the investigation.

> "In *Miranda*, the Court was not concerned solely with the protection of constitutional rights in a custodial atmosphere. The Court enunciated the broader principle that when the investigative power of the government is directed toward an individual with the intent to obtain incriminating evidence from him, that individual should be afforded an opportunity knowledgeably to exercise his constitutional rights. It is because a person cannot knowledgeably exercise his rights unless he is aware of them that multiple warning requirement was established.
>
> "The administrative organization of the Internal Revenue Service offers at least one clear point at which the adversary process can be said to begin in criminal tax investigations. It is at this point, when the case is turned over to the Intelligence Division, that the investigation admittedly has as its ultimate objective the conviction of the taxpayer for criminal tax evasion. He is now a suspect who, although he is unaware of it, is being asked to furnish the investigative agents with information which he has a constitutional right to refuse to furnish and with respect to which he is entitled to have the advice of counsel. He is being asked to help convict himself without knowing it."

United States v. *Turzynski*, (1967 N.D. Ill., E.D.) 268 F. Supp. 877, 852.

In the case at bar, defendant was never advised that he was under criminal investigation. Nor was he ever advised that Special Agent O'Brien was in the case because of the criminal aspect of the case. Indeed defendant had been led by the government to believe that his income tax returns for the years 1959 and 1960 were under investigation when all the time 1956, 1957, and 1958 were the years Special Agent O'Brien was concerned with. (R. 195, Government Exhibit 32; R. 319-320). Of particular significance is the court's language in *Turzynski*, at page 854, where it is stated:

> "There were, of course, a number of cases prior to *Escobedo* in which the courts generally held that admissibility of statements obtained during a criminal tax investigation was determined by whether the statements were given voluntarily and not induced by fraud, coercion or direct. *United States* v. *Achilli*, 234 F.2d 797 (7 Cir. 1956). The investigating agents were not required to warn the taxpayer of his constitutional rights and the fact that the taxpayer was unaware of them or that agents were conducting a criminal investigation was held to be irrelevant to the determination of voluntariness. *United States* v. *Spomar*, 339 F.2d 941 (7 Cir. 1965).
>
> "The authority for these and other similar decisions rests on two earlier Supreme Court decisions, *Wilson* v. *United States*, 162 U.S. 613, 16 S. Ct. 895, 40 L.Ed. 1090 (1896), and *Powers* v. *United States*, 223 U.S. 303, 32 S. Ct. 281, 56 L.Ed. 448 (1912). A reading of these two cases suggests that both have been overruled by *Miranda*. Both cases involved defendants who made certain admissions during the course of preliminary hearings before United States Commissioners. In neither case was the defendant advised of his right to

counsel or his privilege against self incrimination. At the time the admissions were made each defendant was under arrest. The adversary process had begun, the defendants were in custody and *Miranda* would seem clearly to apply. Accordingly the cases predicated upon them would no longer appear to be persuasive.

"With respect to all of the foregoing, it should be noted the C.C.H. Federal Tax Service Release 29-70, dated May 24, 1967, par. 66 37, quoting Internal Revenue Service Document No. 5661 (Rev. 11-66), indicates that Special Agents of the Intelligence Division are now required at first interrogation to read to a taxpayer a Statement of Rights, which contains the substance of the constitutional admonition specified in *Miranda*. As a result, the taxpayer no longer will be unaware that the case has been converted from a civil to a criminal investigation and will be in a position either to make a knowing and voluntary waiver of his rights or to rely upon them." *Turzynski, supra* 854-855.

In the case at bar defendant raised the precise question of whether or not the agents of the Internal Revenue Service had advised defendant of his right to counsel. (R. 327). Defendant specifically objected to the introduction of any evidence derived from the interrogations and made an offer of proof as to why such information should be excluded. (R. 196). These objections were overruled. Defendant anticipates that the government in its brief will point out that this trial was commenced before June 13, 1966, and that accordingly the rule of *Miranda* does not apply because of *Johnson* v. *New Jersey,* (1966) 384 U.S. 719. It is defendant's contention that the case at bar does not fall within the *Johnson* rule because here specific objec-

tion on the *Miranda & Escobedo* grounds was raised at a time when *Johnson* had not been decided.

In the alternative defendant contends that the rationale of *Miranda* demands that a rule similar to that of *Miranda* should apply in tax investigation cases. As pointed out in *Turzynski, supra* the need is just as great, or perhaps greater, for the taxpayer who has been called in for intelligence level interrogation to be advised that he has the right to counsel so that he will not give incriminating information against himself. Defendant submits that justice requires that there ought to be a similar rule for tax cases. In this respect *Turzynski* is a forerunner of what is to come.

The conflict beween the District Court decisions hereinbefore cited and the ruling of the Circuit Court of Appeals for the First Circuit in the instant case ought plainly to be resolved. Your petitioner respectfully submits that a proper application of the constitutional principles enunciated in the *Miranda* decision require that *Turzynski* be followed. It is, therefore, submitted that reversible error adheres in the decision of the District Court to allow into evidence the interrogations of the defendant; and in the affirmance of this action by the Circuit Court of Appeals.

III.

Defendant was indicted for willful evasion of income taxes for 1956, 1957, 1958. (R. 30-31). At the first interrogation at the Intelligence Division of the Internal Revenue Service (October 6, 1961), defendant was advised that his income tax returns for 1959 through 1960 were being investigated. (R. 195, Government Exhibit 32). At no time was the defendant advised that the indictment years were under investigation. (R. 319-320). All subsequent interviews were part and parcel of the same investigation. (R. 192-194, 195, 318, 327). It is defendant's

contention that he did not intelligently waive his right to remain silent and that he did not of free volition volunteer information regarding the indictment years. At all times he believed he was under investigation for the years 1959 and 1960—for he had been so advised by the government and never told otherwise.

Defendant contends that if he had known that he was being investigated for 1956, 1957 and 1958, he would have been able to intelligently exercise his right to remain silent. By advising defendant that only 1959 and 1960 were under investigation, defendant's intelligent choice was deliberately undercut and defendant was unable to make a proper waiver of his right to remain silent. Accord, *Flaherty* v. *United States,* 335 F.2d 294 (1 Cir. 1966).

IV.

The record of the hearing dated March 20, 1967 is completely without basis for an in camera inspection by the Court. The government attempts to justify the in camera inspection by the Court on two grounds (page 528, transcript hearing, March 20, 1967). One, that the defendant had been furnished with material of conversations in which he had participated and that was all that the government was obliged to do. Secondly (page 528, same transcript), "that the U. S. government in its present position has a duty to protect 3rd parties, or not so innocent 3rd parties, from disclosures that is absolutely—rather that is not absolutely required."

There is no argument or no stated position by the court or by the government that a disclosure of all the materials requested by the defendant in his Motion for Discovery dated February 23, 1967, should be protected because of executive privilege; *U. S.* v. *Coplon,* 185 F.2d 629 (2nd Cir. 1950), state secrets; *U. S.* v. *Reynolds,* (1953) 345 U.S. 1, or national defense.

It cannot be denied that the defendant made a strong showing of necessity for the production of all documents. The record is barren of any appeal to the Court by the government that disclosures would be harmful or against public policy. Again this was not a matter which would fall within the purview of 18 U.S.C. 3500 (Jencks Act), as indicated by the Trial Court, Page 538. This was pre-trial discovery of illegally monitored conversations in which the defendant did in fact, participate. The trial court seemingly failed to consider that the defendant-appellant was an employee at the premises at 168 Atwells Avenue, Providence, Rhode Island.

The very fact, that while the district court was making an in camera inspection the U. S. Government attempted to off-the-record furnish to the defendant almost five times as much material as had been furnished as a result of the court order for disclosure dated March 8, 1967, is some indication that the government was having trouble deciding what conversations the defendant had participated in.

The case of *U. S.* v. *Coplon, supra,* stands for the proposition that it is an error to deny discovery of illegally obtained evidence. In *Coplon, supra,* the court stated:

> "The only relevant inquiry comes down to this: was it an error for the judge not to let the defense see those records which he read in camera and on which he in part based his finding that the 'taps' had not 'led' to any evidence introduced at the trial? We cannot see how this action can be sustained; or any escape from the following reasoning. Since the prosecution had the burden of showing that the 'taps' did not 'lead' to any of the evidence, it could not carry that burden without showing that none of the 'taps' did so, and the suppressed documents were concededly records of some of the 'taps'. . . .

"There certainly is no such excuse. We agree that there may be evidence—'state secrets'—to divulge which will imperil 'national security'; and which the Government cannot, and should not, be required to divulge. *Salus rei publicae suprema lex.* The immunity from disclosures of the names or statements of informers is an instance of the same doctrine. This privilege will often impose a grievous hardship, for it may deprive parties to civil actions, or even to criminal prosecutions of power to assert their rights or to defend themselves. That is a consequence of any evidentiary privilege. It is, however, one thing to allow the privileged person to suppress the evidence and *totocoelo,* another thing to allow him to fill a gap in his own evidence by recourse to what he suppresses. In *United States* v. *Andolschek,* 142 F.2d 503, 506, we held that, when the Government chose to prosecute an individual for crime, it was not free to deny him the right to meet the case made against him introducing relevant documents, otherwise privileged. We said that the prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such 'state secrets' as might be relevant to the defense. To that we adhere.

"In the case at bar it may seem to have been a flimsy grievance to deny to Judith Coplon the opportunity to argue that these records did 'lead', or might have 'led', to her conviction; in truth it is extremely unlikely that she suffered the slightest handicap from the judge's refusal. But we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor. Back of this particular privilege lies a long chapter in the history of Anglo-American institutions. Few weapons in the arsenal of freedom

> are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny, and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards obsolutism."

The somewhat cavalier decision of the Circuit Court to the effect that the in camera function of the District Court in this case was "nothing more than. . .an exercise in eliminating 'extraneous matter' " shakes the very foundations of our system of jurisprudence. Moreover, such a statement appears to fly in the face of the careful reasoning of Your Honors in *Denice* v. *United States,* 384 U.S. 855, 874 (1966). There was no warrant whatever for the use of this procedure—for no matter how convenient in camera review may be from the point of view of the government, it is in complete derrogation of the constitutional rights of the defendant.

V.

We turn now to a consideration of the effect of the prosecution's encroachment on the attorney-client relationship. The Memorandum and Order of the Court of Appeals dated January 17, 1967, is of particular value with regard

to this issue. In the first paragraph of the court's memorandum, the court stated:

> "The government contends that *Black (Black* v. *U. S.*, 385 U.S. 26) is distinguishable, principally because in the present case there were not overheard any conversations between the defendant and his attorney."

This Court went on to stress that it declined to award an outright new trial since in the case at bar no "overtones" of encroachment on the attorney-client relationship were asserted.

These "overtones" were, of course, prominently injected into this case by the government's belated disclosure of May 3, 1967.

On March 20, 1967, the case of *O'Brien* v. *United States, supra,* was decided. It was a *per curiam* decision. While the majority wrote no opinion, it is interesting to note from the *O'Brien* dissent the similarity in detail of the *O'Brien* case and the *Taglianetti* case.

The only opinion reported was that of two dissenters who interestingly enough were the dissenters in *Black.*

> "The issues raised in the petition for *certiorari* involve questions as to the sufficiency of the indictment and alleged errors at trial, none of which could well be deemed worthy of review by this court. However, the Solicitor General in his response commendably notified the Court that pursuant to a general review of the use of 'electronic eavesdropping or wiretapping', he discovered that a microphone had been installed in a commercial establishment owned by an acquaintance of petitioner O'Brien. A conversation in which O'Brien participated, occurring after the in-

dictment and concerning his forthcoming trial, was overheard. The Solicitor General characterizes the episode as follows: 'That conversation, although overheard by the monitoring agents and summarized in their logs, was not mentioned in any F.B.I. report nor were its contents communicated to attorneys for the Department of Justice, including those who prosecuted this case.'

"The Solicitor General further revealed a later conversation which he characterizes as follows: 'It also appears from the logs of this surveillance . . . that petitioner O'Brien was on the premises and was overheard in January, 1964, when he placed a telephone call and requested one of his attorneys to file an application relating to the territorial conditions of his release on bail. This conversation, like the one in May, 1963, was noted in the logs of the monitoring agents but was not communicated in any manner outside the F.B.I. . . .'

"In the present case, however, I can think of no justification for going beyond the position of the Solicitor General and forcing the Government to go through the effort and expense of an entirely new trial on the basis of this peripheral, totally insignificant, and uncommunicated eavesdropping. As in *Black*, I consider the Court's action quixotically precipitous."

While it is not preferred practice to take the law from a minority opinion, the defendant respectfully submits that there is no such inhibition with respect to the facts. Moreover, the government's memorandum in support of its position filed in *O'Brien* (a copy of which had been supplied to the District Court by the defendant), states in great detail the exact facts as portrayed in the dissenting opinion;

so that for all intents and purposes, an accurate statement of the facts in *O'Brien* is without question.

In *O'Brien* only two conversations, one in May of 1963, and the other in January of 1964, were disclosed to the Supreme Court by the government. Both of these conversations were subsequent to the indictment of O'Brien. In the *Taglianetti* case some thirteen conversations pertaining to the tax case were monitored subsequent to indictment (and these, of course, were not the only conversations of the defendant monitored during this period).

Of significance is the fact that the monitored conversation between O'Brien and his attorney in both the government memorandum and the dissenting opinion are word for word that conversation which follows:

> "He, (O'Brien), placed a telephone call and requested *one of his attorneys* to file an application relating to the territorial conditions of his release on bail." (Emphasis supplied.)

The dissent remarked that these conversations in *O'Brien* were peripheral, totally insignificant and uncommunicated. It is respectfully submitted that the majority felt otherwise, i.e., regardless of the nature and content of the conversation, ANY INTRUSION ON THE LAWYER-CLIENT RELATIONSHIP SUBSEQUENT TO INDICTMENT IS GROUNDS FOR A NEW TRIAL. In the case at bar in every instance, the thirteen already mentioned conversations so monitored were concerning the case at bar, namely Indictment No. 6912.

Moreover, the conversation of February 16, 1965, as it appears on government's exhibit No. 116, (which is the agent's log of February 16, 1965) is a conversation between the defendant Taglianetti and one of his attorneys, Robert G. Crouchley. Agent Dunn testified concerning this conversation. He stated that he had no independent recollec-

tion of the conversation; that his log entries were the sole recollection of the event on this day; and that the first sentence of his enry is as follows:

> "Louis Taglianetti talks to Bob Crouchley on phone about his I.R.S. case."

It is quite clear that in February of 1965, there was but one case pending against the defendant, and that case was Indictment No. 6912. It is respectfully submitted that on any view of the evidence, it is undeniable that the conversation between the defendant and his attorney concerned the pending indictment and trial. As in *O'Brien*, even if this Court found the conversation peripheral, totally insignificant and not communicated by the F.B.I. to the I.R.S., a new trial would nonetheless be mandatory.

It seemed clear in the decision in *Black* v. *United States*, 385 U.S. 326, (1966) that monitoring of such conversations would make a new trial mandatory. In the subsequent decision in *O'Brien* v. *United States (supra)*, it seemed clear that this rule would apply despite the fact that the conversation monitored was peripheral, insignificant and uncommunicated. The only possible avenue of doubt arose from the fact that these decisions were brief Per Curiam decisions and the governing law really had to be taken from the dissenting opinions. This doubt, if it ever existed, has, since the hearing in this matter, been erased by the decision of the United States Supreme Court on May 22, 1967 in *Hoffa* v. *United States*. Although, *Hoffa* was sent back for a hearing similar to that held in the case at bar, the majority (seven justices) took special pains to indicate that there was no adequate justification for the granting of an outright new trial, since in *Hoffa*, unlike *Black* and *O'Brien*, "there was apparently no direct intrusion into attorney-client discussion." It is clear, therefore, that the

United States Supreme Court has flatly adopted a standard whereby *any* "direct intrusion" into an attorney-client relationship renders a resulting conviction invalid, without regard to the substantive significance of the conversation monitored and without regard to the communication of the fruits of the illegal activity by the monitoring arm of the government to the prosecuting arm of the government. The undisputed, incontrovertible facts as produced at the post-conviction hearing in the case at bar plainly place this case squarely within the standard as thus announced. This Supreme Court is now confronted with an opportunity to explicitly decide what it has already decided by implication in the cases hereinbefore mentioned. It is uncontradicted in this case that an intrusion into the attorney-client relationship did occur; that this instrusion was at the instance of the government, by unlawful means violative of due process; and that the same occurred during a time period when the federal indictment against the defendant was pending. The constitutional import of the question is such that it ought to be resolved so as to remove any doubt which may suffuse this area of the law. Your petitioner respectfully submits that any such consideration of the issue would conclude by the ordering of a new trial in the circumstances of this case.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel:

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Appendix A

[1] STENOGRAPHIC TRANSCRIPT OF DECISION IN RE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL.

By his Honor, Judge Day
Monday, August 16, 1966

[2] The Court. (Delivered orally from the bench) This is an indictment which contains three counts charging the defendant with three separate violations of the provisions of 26 U.S.C., Section 7201. The case was tried to a jury which rendered its verdicts on April 28, 1966. At the close of all of the testimony the defendant moved for the entry of a judgment of acquittal upon which the Court reserved its decision. Subsequently, the defendant in writing renewed its motion for said judgment of acquittal or, in the alternative, for a new trial pursuant to the provisions of Rule 29(b) of the Federal Rules of Criminal Procedure. At the conclusion of oral arguments in favor of and in opposition to this motion the Court reserved decision.

In support of his motion the defendant urges approximately 35 grounds. However, he seems to rely chiefly upon the three following grounds:

1. The government's failure to prove an essential element of the offense. The prosecution being based solely on the cash expenditures theory, no evidence was offered by the government to establish an opening or a closing net worth statement.

2. The reference of government counsel in his closing argument to his "fight against Communism," and his attempt to supply testimony not otherwise in the case.

[3] 3. The failure of the representatives of the Internal Revenue Service to advise the defendant of his right to counsel and of his right to have counsel during any interviews between them and the defendant.

It appears that there were several such interviews and it is clear that prior to none of them did representatives of the Internal Revenue Service advise the defendant of his right to counsel.

Insofar as the instant motion is regarded as being a motion for judgment of acquittal, in passing thereon it is the duty of the Court to view the evidence and the reasonable inferences to be drawn from it in the light most favorable to the government. *Cartwright* v. *United States,* (1964), 10 Cir., 335 F.2d 919; *White* v. *United States,* (1960), 4 Cir., 279 F.2d 740; *United States* v. *Sawyer,* (1961), 4 Cir., 294 F.2d 24.

In addition, in considering the evidence which was specifically introduced during the trial, the Court in passing upon such a motion should consider the inferences which the jury might reasonably draw from the evidence which was produced. *Gusow* v. *United States,* (1965), 10 Cir., 347 F.2d 755; *Cartwright* v. *United States, supra.*

It is true that if an essential element of the offenses charged was not established by proof beyond a reasonable [4] doubt, the defendant is entitled to a judgment of acquittal. *Christoffel* v. *United States,* (1949), 338 U.S. 84; *McKenzie* v. *United States,* (1959), 10 Cir., 266 F.2d 524.

It is clear that in a prosecution for evasion of income taxes based on the cash expenditures theory it is necessary that the government prove the value of the taxpayer's net worth with reasonable certainty at the beginning of the taxable year involved. "Such net worth must be both clearly and accurately established by competent evidence." *Brodella* v. *United States,* (1950), 6 Cir., 184 F.2d 823-824; *United States* v. *Fenwick,* (1949), 7 Cir., 177 F.2d 488;

Bryan v. *United States*, (1949) 5 Cir., 175 F.2d 223; *Thomas* v. *Commissioner of Internal Revenue*, (1956), 1 Cir., 232 F.2d 520.

No reason appears, however, why a clear and accurate approximation of the defendant's net worth may not be the result of inferences reasonably drawn from the evidence.

In the instant case government's Exhibit No. 33, a typewritten record of the interrogation in question-and-answer form of the defendant by an employee of the Internal Revenue Service on April 23, 1962 was in my opinion most revealing. Construing the defendant's answers to the questions in this interview most favorably to the government, in my opinion the jury could reasonably infer and find that [5] the defendant had no investments, no cash accumulations, and that on January 1, 1956 the only funds available to him from January 1, 1956 through December 31, 1960 were a $10,000 "bank roll" borrowed by him from banks and used by him as principal for his activities at race tracks, and that he was unable to use, and as he claimed did not use, this money for any other purpose except for those activities.

In the light of this evidence the inference is reasonable that the expenditures, which the defendant is shown to have made, were made from income derived from an undisclosed source, not reported in the defendant's income tax returns.

Viewing the evidence in its entirety and the reasonable inferences to be drawn from it in the light most favorable to the government, the motion of the defendant for judgment of acquittal must be and is denied.

Insofar as the defendant's motion is, in the alternative, a motion for a new trial, at the outset it is to be noted that this motion is addressed to the sound discretion of the trial court and a different test is to be applied in passing upon such a motion.

It is well settled that "if the verdict is contrary to the weight of the evidence and a miscarriage of justice [6] may have resulted, a new trial may be granted." *United States* v. *Beacon Musical Instrument Company,* (1955), D.C. Mass., 135 F. Supp. 220; *United States* v. *Garrison,* (1961), 7 Cir., 296 F.2d 461; *Finley* v. *United States,* (1959) 5 Cir., 271 F.2d 777.

In passing upon such a motion the trial judge may properly consider knowledge gained while presiding over the trial. *United States* v. *On Lee,* (1953), 2 Cir., 201 F.2d 722; *United States* v. *Marachowsky,* (1954), 7 Cir., 213 F.2d 235.

In my opinion there was ample evidence, together with the reasonable inferences to be drawn from it, to warrant the jury in finding the defendant guilty beyond a reasonable doubt on each of the three counts in this indictment. In my humble opinion it cannot be said that there was insufficient evidence to warrant a reasonably intelligent jury in finding the defendant guilty as charged.

The defendant's contention that he is entitled to a new trial because of improper argument by counsel for the government is in my opinion without merit. The Court promptly directed the jury to disregard the argument of which complaint is made, and I have no reason to believe that the jury did not follow my directions in this regard.

Lastly, the defendant contends he is entitled to a new [7] trial because of the failure of representatives of the Internal Revenue Service to advise him of his right to counsel during their several interviews with him. In urging this contention counsel for the defendant rely upon the opinion of the Supreme Court of the United States in *Arizona* v. *Miranda,* decided June 13, 1966.

Subsequent to its opinion in that case the Supreme Court of the United States handed down its opinion in the case of *Johnson and Cassidy, Petitioners,* v. *State of New Jersey,*

on June 20, 1966. In the latter case the Supreme Court made it clear that the guidelines laid down in *Arizona* v. *Miranda,* supra, were available only to defendants whose trials had not begun as of June 13, 1966. As hereinbefore pointed out, the defendant's trial was completed on April 28, 1966, and, accordingly, the guidelines set down in *Arizona* v. *Miranda,* supra, have no application to the instant case.

The other alleged errors claimed by the defendant are in my opinion without merit.

Accordingly, the defendant's motion for judgment of acquittal, or, in the alternative, for a new trial is denied. The defendant's objection to the Court's ruling is noted.

ORDER

This matter came on to be heard on the defendant's motions for judgment of acquittal, notwithstanding the verdict or in the alternative motion for new trial and, after hearing thereon, and consideration therof, it is hereby

ORDERED, ADJUDGED AND DECREED

That the said motions be, and the same are hereby denied and dismissed.

By Order,

(s) NEALE D. MURPHY
Clerk

Enter:

(s) EDWARD W. DAY
Chief Judge
United States District Court

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

v.

LOUIS J. TAGLIANETTI

Indictment No. 6912.

OPINION

October 4, 1967

DAY, *Chief Judge.* On September 16, 1966, the defendant filed an apeal with the Court of Appeals For The First Circuit from the sentence imposed on him by this court following his conviction upon an indictment charging him with three violations of 26 U.S.C. § 7201. Thereafter, on December 27, 1966, the Government filed with said Court of Appeals a motion to remand the case to this court for "further proceedings". In said motion the Government stated in substance that the Federal Bureau of Investigation in March, 1962, installed a microphone, by means of a trespass, at the place of business of a close business associate of defendant where defendant and others frequently met; that on various occasions between 1962 and 1965 defendant's conversations were monitored by agents of the Federal Bureau of Investigation, certain of which related to that indictment upon which the defendant was tried and

convicted; that logs were kept in which there appear summaries of these and other conversations in which defendant participated; that although tape recordings were also made of said conversations, they were later routinely erased, but the logs are in existence; and that it does not appear from said logs or from inquiry into the handling of defendant's case by the Internal Revenue Service, the Department of Justice and the United States Attorney that any of said monitored conversations were used in evidence or were the source of leads to any evidence presented during the trial of said case; and requested that said case be remanded to this court "for the limited purpose of enabling the district court to examine the facts and to determine whether appellant's conviction should stand or a new trial be granted."

Thereafter, on January 17, 1967, the Court of Appeals remanded said case for the limited purpose requested by the Government in its motion, but with the cautionary instruction that "if the court is in doubt as to its ability, as the evidence develops, to resolve the matter as clearly as it could were a complete new trial granted, it may, and should, order such a new trial forthwith."

After said remand, this court, upon the motion of the defendant, entered its orders dated March 8, 1967 and April 17, 1967, directing the Government to deliver to the defendant and his counsel for examination and inspection copies of all logs containing summaries of all monitored conversations in which the defendant participated at said place of business of his close business associate, and copies of any and all memoranda and airtels summarizing such conversations. In addition, said orders directed the Government to furnish the defendant and his counsel with the names and addresses of all persons who participated in said monitoring and in the preparation of said logs, memoranda and airtels.

Defendant also moved for the production and inspection of all logs, memoranda and airtels containing summaries of the monitored conversations of other persons on said premises in which he did not participate. The Government objected to the production of these logs, memoranda and airtels on the ground that the defendant had no standing which entitled him to their production for examination and inspection. It did, however, submit all of said logs memoranda and airtels to me for inspection in order to determine whether they, or any of them, should be produced. I examined all of them and concluded that they included no additional conversations in which the defendant participated, and that the conversations included therein have no relevance to this proceeding. Accordingly, I sustained the Government's objection to their production for examination and inspection by the defendant. Said logs, memoranda and airtels have been impounded and made available for appellate review if such review of my ruling in this respect is desired by the defendant.

After the logs of said monitored conversations were delivered to the defendant pursuant to said orders of this court, dated March 8, 1967 and April 17, 1967, John A. Varone, Esquire, of counsel for the defendant, on April 28, 1967, advised me and counsel for the Government in my chambers that the material produced pursuant to said orders disclosed the monitoring, on February 16, 1965, of a telephone conversation between the defendant and Robert G. Crouchley, Esquire, an attorney in the office of Mr. Varone, who had been associated with him from November, 1962 until October 1, 1965, and who had assisted him while so associated in the preparation of the defendant's defense to the alleged offenses for which he was indicted on February 26, 1963. This indictment, No. 6912, contained three counts and charged that the defendant did wilfully and knowingly attempt to evade and defeat a large part of

the income taxes due and owing by him and his wife for the calendar years 1956, 1957 and 1958, in violation of 26 U.S.C. § 7201.

Thereafter a hearing was held by me pursuant to said order of the Court of Appeals to determine whether any of said monitored conversations were used as evidence or were used as leads to any evidence presented in the prosecution and trial of the defendant. During this somewhat protracted hearing, the Government and the defendant produced both testimonial and documentary evidence.

The evidence adduced at said hearing establishes that from March 6, 1962 until July 12, 1965, inclusive, agents of the Federal Bureau of Investigation (hereinafter called "F.B.I.") maintained an electronic surveillance of the place of business of a business associate of the defendant located at 168 Atwells Avenue, in the City of Providence, in the State of Rhode Island. The overall purpose of said surveillance was to gather criminal intelligence with respect to organized crime. It was conducted under the direction of Mr. John F. Kehoe, Jr., a special Agent in the Boston office of the F.B.I. Special Agents assigned to the Providence office of the F.B.I. monitored conversations that occurred on said premises and made notes thereof in a log. Some of the conversations were also recorded on a tape recorder. At the end of each day said log and tape recording were mailed or delivered to Special Agent Kehoe in Boston. The monitors were instructed not to discuss the information recorded by them and were under orders not to disseminate said information to anyone except Special Agent Kehoe. Special Agent Kehoe would review the log and listen to the tape recording. After doing so, he would dictate a memorandum and an airtel summarizing the contents thereof. The tape recording would then be routinely erased. The memoranda and airtels were substantially duplicates and after a while he dictated only airtels.

An airtel is an inter-bureau teletype sent by air mail. The airtels were sent by him to the F.B.I. in Washington, D.C. and in some instances to certain field offices of the F.B.I. In no instance was an airtel disseminated to a field office or to the headquarters of the F.B.I. because it contained information concerning the defendant. The logs received by Special Agent Kehoe were retained by him in his office under lock and key until this proceeding. He kept a record of any of the material that was disseminated by him. His records reflected no dissemination outside the F.B.I. except for two memoranda that were transmitted to the Attorney General concerning an incident in New York. These memoranda were delivered to counsel for the defendant prior to the hearing, were not introduced into evidence and have no bearing on any claim that tainted evidence was used during said trial. Mr. Kehoe testified unequivocally that none of the information concerning the defendant was ever disseminated or communicated to the Internal Revenue Service or any other Federal agency.

The criminal tax evasion case against the defendant had its inception in June, 1961 when Internal Revenue Agent Robert J. Manning, was assigned to audit the defendant's tax returns for the years 1959 and 1960. After an extensive investigation he referred the case to the Intelligence Division of the Internal Revenue Service for criminal investigation on September 11, 1961. At that point, Special Agent James F. O'Brien of the Internal Revenue Service was directed to examine said case and determine whether it merited a criminal investigation. After examining Manning's written report and discussion with him, he concluded that said case warranted a criminal investigation. On September 20, 1961, he was placed in charge of that investigation.

Thereafter, Revenue Agent Manning continued to work on said case under the direction of Special Agent O'Brien

until he was succeeded by Revenue Agent Frank A. Racca, on March 20, 19[illegible] Manning's work papers and report were completed [illegible]rch 5, 1962 and were introduced as exhibits in this [illegible]ng. They were used and relied upon by Special Agent O'Brien as the source of leads to evidence produced in said criminal trial. In fact, it is clear that they contained the items of evidence and leads to every item of evidence that was presented by the Government during this trial, except the evidence of expenditures made by the defendant for food which was furnished by the defendant at an interview on April 23, 1962.

The evidence clearly establishes that Revenue Agent Racca adopted Manning's work product and worked under the direction of Special Agent O'Brien until he completed his report on June 26, 1962. That report reflects every item of evidence developed during the criminal trial and the figures contained therein were the same as those developed during said trial except for increases therein arising out of trial developments, such as a witness producing a ledger card that had been overlooked when previously requested by Special Agent O'Brien. And it is likewise abundantly clear that Revenue Agent Racca obtained his basic data from Manning's report which had been completed on March 5, 1962.

The evidence further establishes that Special Agent O'Brien had completed his investigative activities prior to March 5, 1962. His only work thereafter consisted of procuring certain documentary evidence of transactions by the defendant which had been previously discovered and of drafting his report. He completed his report and submitted it to his superiors on June 29, 1962. In the report he recommended that the defendant be prosecuted for tax evasion for the years 1956 to 1960, inclusive.

Thereafter his report was submitted to the Regional Counsel for the Internal Revenue Service in Boston. It

was reviewed by Attorney Sanford S. Neuman of his staff. Thereafter he conferred with the defendant's Boston attorney and later with Special Agent O'Brien. He requested the latter to further document several items which appeared in his report. This he did and forwarded documentation thereof to Mr. Neuman in a supplemental report dated August 10, 1962, which is likewise an exhibit herein. It is clear that Special Agent O'Brien did not investigate any new areas at this time.

After reviewing said reports and exhibits included therein, Mr. Neuman forwarded the case to the Department of Justice by letter dated September 20, 1962, with the recommendation that the defendant be prosecuted for wilfully and knowingly attempting to evade and defeat a large part of the income taxes due and owing by him and his wife for the calendar years 1956 through 1958, inclusive.

It is clear that Mr. Neuman had no contact with any member of the F.B.I. and did not receive any evidence or information from any member of the F.B.I. His recommendation was based solely upon the information obtained from the defendant's attorney and that contained in the reports of Special Agent O'Brien.

Thereafter his recommendation for prosecution was reviewed and adopted by the Department of Justice, and, by letter dated October 26, 1962, the case was transmitted to the United States Attorney for the District of Rhode Island with instructions to prosecute the defendant for wilfully and knowingly attempting to defeat and evade a large part of the income taxes due and owing by him and his wife for the calendar years 1956, 1957, and 1958.

I am satisfied from the evidence that Special Agent O'Brien and Revenue Agents Manning and Racca did not have any contacts with any member of the F.B.I. and that none of them at any time received any information from any member of the F.B.I. None of the leads to evidence

obtained by them, or actions taken by them to procure evidence in support of the prosecution of the defendant was in any way connected with or derived from said electronic surveillance which did not begin until March 6, 1962.

After said case was transmitted to the United States Attorney for this District and an indictment was returned against the defendant, the indictment was assigned to Assistant United States Attorney Frederick W. Faerber who prepared the bill of particulars which the Government was directed to furnish upon the motion of the defendant. I am satisfied by the testimony of Mr. Faerber that in preparing said bill of particulars he relied solely upon information supplied by Special Agent O'Brien, and that he did not at any time have any contact with or receive any information concerning said case from any member of the F.B.I, and that he was not aware of said electronic surveillance until December, 1966, approximately eight months after the trial of the defendant in April, 1966.

Similarly, I am satisfied by the testimony of former Assistant United States Attorney Alton W. Wiley, who prepared said case for trial and who prosecuted it, that he did not procure any leads to evidence or evidence that was introduced during said trial, and that he relied exclusively on that evidence which had been originally procured by Revenue Agent Manning, and subsequently developed and refined by Special Agent O'Brien and Revenue Agent Racca. Likewise, I am similarly satisfied that he did not receive any information from the F.B.I. that was the product of said illegal electronic surveillance, and that he was not aware of said activity by the F.B.I. until December, 1966.

As hereinbefore recited, it appears that on February 16, 1965, an agent of the F.B.I. monitored a telephone conversation between the defendant and Robert G. Crouchley, Esquire, an attorney who was associated with the defend-

ant's attorney, John A. Varone, from November, 1962 until October 1, 1965. From the evidence it appears that Mr. Varone was injured in an automobile accident on January 5, 1965, and as a result was away from his office until March, 1966. On the day following said accident he called Mr. Crouchley and requested him to take over his cases until he could return to his office. Mr. Crouchley never entered any appearance in the criminal case then pending against the defendant.

According to his testimony, Mr. Crouchley, some time prior to February 16, 1965, received a telephone call from "some member of the Internal Revenue Service" who stated that he had a form that the Government wanted the defendant to sign, and asked him to find out if the defendant would sign it and that he agreed to make the inquiry of the defendant. He testified that he did not see the form, that he could not recall the nature of the form, and, further, that he had no present recollection as to whether he had inquired of the person who called him as to the nature and purpose of said form. He testified that he thereupon instructed Mr. Varone's secretary to contact the defendant and that he may have also mentioned the request made of him to Mr. Varone. In any event, it is clear that the defendant on February 16, 1965, while on the premises at 168 Atwells Avenue, made a telephone call to Mr. Crouchley at his office. That telephone call was monitored by Special Agent Edward J. Dunn, Jr., of the F.B.I. He made notes of the telephone conversation and at the same time recorded the conversation on a tape recorder. In his log for February 16, 1965, he made the following entry, among others:

> "Louis Taglianetti talks to Bob Crouchley on phone about his I.R.S. case. Crouchley asks if Louie will sign form I.R.S. wants — Louie says no he got in trouble by doing that."

Mr. Crouchley testified that he did receive the telephone call form the defendant, and that he told the defendant that a revenue agent had a form which he wanted him to sign. He further testified that it was his best recollection that the defendant did not then indicate his unwillingness to sign said form. While his recollection of the telephone call was at best very vague, he insisted that he did not give any advice to the defendant during said conversation and that he merely asked the defendant if he was willing to sign said form and had no other discussion with him. At the time of said telephone call, Special Agent Dunn did not know Mr. Crouchley and made no attempt to ascertain his identity or occupation. He did not disclose the monitored conversation to anyone outside the F.B.I. His log and tape were forwarded to Special Agent Kehoe who, after receiving said log and after listening to said tape recording, prepared an airtel on February 18, 1965 wherein he stated that no pertinent information was developed on February 16, 1965. Mr. Kehoe likewise did not know Mr. Crouchley and made no effort to ascertain his identity.

From the evidence presented by the Government, it is clear beyond a reasonable doubt that the form to which Mr. Crouchley referred in his conversation with the defendant was a form used by the Internal Revenue Service to obtain from a taxpayer an extension of the three year statute of limitations on civil liability for unpaid income taxes and is known as Form 872. The form related to the defendant's income taxes for the year 1961, upon which the statute of limitations would expire on April 15, 1965. It appears that on January 20, 1965, the Chief of the Audit Division of the Internal Revenue Service had forwarded three copies of said Form 872 to the defendant and his wife with the request that all three copies be executed and returned by them to the Audit Division. The defendant did not reply to that letter. A second attempt to secure

his consent to such extension was initiated on February 15, 1965, when Revenue Agent Racca was apparently directed to solicit the execution of said Form 872 by the defendant. Apparently he contacted Mr. Crouchley and received the impression that the defendant would not sign the form, while Mr. Crouchley only meant that he would ask the defendant if he would do so. In any event, his refusal was apparently communicated by Mr. Crouchley to the Internal Revenue Service and an entry was made to that effect in its records on February 17, 1965. I am satisfied that the only form which the Internal Revenue Service asked the defendant to sign in 1965 was Form 872 for the year 1961. As a result of his refusal to sign it, the three-year statute of limitations for making civil adjustment to his income tax return for the year 1961 expired on April 15, 1965.

It is well settled that the fact that the F.B.I. illegally monitored conversations of the defendant is not in itself a ground for setting aside the defendant's conviction. The issue is — did the Government use information gained by such activities either as evidence or as leads to evidence in the prosecution and trial of the defendant that resulted in his conviction. If it did, the conviction is tainted and should be set aside by me and a new trial accorded to the defendant. *Wong Sun* v. *United States,* 1963, 371 U.S. 471, 487; *Nardone* v. *United States,* 1939, 308 U.S. 338, 341; *Silverthorne Lumber Co.* v. *United States,* 1920, 251 U.S. 385, 392.

After a painstaking consideration of all of the evidence and the reasonable inferences to be drawn from it, I find that the Government has established by proof beyond a reasonable doubt that none of the information produced by said electronic surveillance was the source of evidence or leads to any evidence presented by it to the jury during the trial of the defendant. As hereinbefore pointed out, that evidence was developed by Special Agent O'Brien

and Revenue Agent Manning, except for minor details, prior to the commencement of said electronic surveillance. In addition, I am satisfied beyond a reasonable doubt that none of the information gained thereby was ever disseminated outside the F.B.I. except for the so-called New York incident which counsel for the defendant conceded was immaterial and irrelevant to this hearing.

Counsel for the defendant contend that the defendant is entitled to a new trial as a matter of law because the F.B.I. monitored said conversation between the defendant and Mr. Crouchley. In support of this contention they cite *Hoffa* v. *United States,* 1967, 387 U.S. 231; *O'Brien* v. *United States,* 1967, 386 U.S. 345, and *Black* v. *United States,* 1966; 385 U.S. 26. In my opinion each of those cases is clearly distinguishable on its facts from the instant case. While it is true that the Supreme Court in *Hoffa* v. *United States,* supra, did point out that apparently there was no direct intrusion into attorney-client discussions involved therein, I do not think it can be fairly said that the Supreme Court held that if there had been an intrusion into any attorney-client conversation a new trial would be mandatory. In both *Black* v. *United States,* supra, and *O'Brien* v. *United States,* supra, there were intrusions into conversations between the accused and his attorney regarding the charge upon which he was convicted.

The conversation between defendant and Mr. Crouchley which was intercepted did not relate to the then pending indictment against the defendant. It related to his civil liability for income taxes for the year 1961. During this conversation Mr. Crouchley admittedly gave no advice to the defendant. He was merely acting as a messenger to relay the request of a revenue agent to the defendant and to obtain the defendant's answer thereto for transmittal to said agent. Under the circumstances, it cannot be said that said conversation was privileged. *United States* v. *Mc-*

Donald, 1963, 2 Cir., 313 F.2d 832; *Colton* v. *United States,* 1962, 2 Cir., 306 F.2d 633; *United States* v. *Tellier,* 1958, 2 Cir., 2555 F.2d 441; *United States* v. *Wilcoxon,* 1956, 10 Cir., 231 F.2d 384; *Gretsky* v. *Miller,* 1958, D.C. Mass., 160 F. Supp. 914. In any event, since it is clear beyond a reasonable doubt that said conversation was unrelated to the criminal case then pending against the defendant, its interception does not automatically require that the defendant's conviction be set aside and a new trial granted. *Granello* v. *United States,* 1966, 386 U.S. 1019. Moreover, it is clear beyond a reasonable doubt that said conversation was never disseminated outside the office of Special Agent Kehoe and was not deemed to be of sufficient importance to be included in his airtel of February 18, 1965.

In conclusion, I find that the Government has established beyond a reasonable doubt that the defendant's conviction was not tainted by the use of evidence or leads to evidence procured by said illegal electronic surveillance. Accordingly, his conviction must stand and he is not entitled to a new trial.

(s) EDWARD W. DAY
Edward W. Day
Chief Judge

Appendix B

United States Court of Appeals

For the First Circuit

No. 6829.

LOUIS J. TAGLIANETTI,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

John A. Varone, with whom *Bruce M. Selya* and *John F. McDonough* were on brief, for appellant.

John P. Burke, Attorney, Department of Justice with whom *Mitchell Rogovin,* Assistant Attorney General, *Lee A. Jackson* and *Joseph M. Howard,* Attorneys, Department of Justice, and *Edward P. Gallogly,* United States Attorney, were on brief, for appellee.

July 18, 1968.

COFFIN, *Circuit Judge.* This is an appeal from a conviction under 26 U.S.C. § 7201 for income tax evasion during the calendar years 1956, 1957, and 1958. Appellant alleges failure of proof of an essential element of the government's prosecution under the "cash expenditure" method of establishing unreported taxable income, errors in various rulings and in the instructions of the district court at trial, and error in the court's consideration and disposition, pursuant to our earlier remand, of the question of possible taint occasioned by a wiretap of telephone conversations in which appellant took part. We affirm.

The Net Worth Issue

Appellant filed joint tax returns with his wife for the years in prosecution, showing income from two sources: his employment as a "locations" man for a cigarette vending machine company and his net winnings from parimutuel betting. Relevant data from these returns are set forth in the margin.[1] The government's evidence at trial showed substantially larger amounts of income and tax due.[2]

The government proceeded on a "cash expenditure" theory. This is a variant of the net worth method of establishing unreported taxable income. Both proceed by indirection to overcome the absence of direct proof. The net worth method involves the ascertaining of a taxpayer's net worth positions at the beginning and end of a tax period, and deriving that part of any increase not attributable to reported income.[3] This method, while effective against taxpayers who channel their income into investment or durable property, is unavailing against the taxpayer who consumes his self-determined tax free dollars during the year and winds up no wealthier than before. The cash expenditure method is devised to reach such a taxpayer by estab-

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[1]

	1956	1957	1958
Wages	$2,400.00	$4,160.00	$4,160.00
Parimutuel winnings	5,105.00	4,960.00	5,290.00
Adjusted gross income	7,505.00	9,120.00	9,450.00
Tax	877.99	1,065.76	1,133.30

[2]

	1956	1957	1958
Adjusted gross income	$15,718.01	$14,229.90	$17,004.02
Taxable income	12,318.01	9,741.76	12,752.19
Tax	2,815.40	2,132.86	2,945.66

[3] We have recently had occasion to deal with this approach in *McGarry* v. *United States*, 388 F.2d 862 (1st Cir. 1967), *petition for cert. filed*, 36 U.S.L.W. 3399 (3/1/68).

lishing the amount of his purchases of goods and services which are not attributable to the resources at hand at the beginning of the year or to non-taxable receipts during the year.[4] The beginning and ending net worth positions must be identified with sufficient particularity to rule out or account for the use of a taxpayer's capital to pay for his purchases. If the end-of-year net worth position is equal to that at the beginning of the year, and if there are no non-taxable sources of income during the year, such as gifts or inheritances, the totality of the year's expenditures reflects total taxable income. If ending net worth shows an increase, the increase reflects an added component of income. If ending net worth shows a diminution, the decrease reduces pro tanto the extent to which expenditures reflect income.

In this case the government's evidence, based on appellant's admissions at several interviews and its own independent investigation, tended to establish that appellant and his wife owned very little property. They lived in rented premises until mid-1957 when they moved into a house inherited by his wife and sister-in-law. He owned a 1955 Cadillac which he traded in 1956 for a 1956 Cadillac, which was traded in 1957 for a Lincoln. He owned a boat which he sold in 1956, using the proceeds as part payment for a much more expensive boat. He owned no stocks, bonds, life insurance (except for $2,000 coverage in connection with a sickness benefit policy), or any other property. He had no checking account or savings account. His

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[4] Judge Goodrich defined this method in *United States* v. *Caserta*, 199 F.2d 905, 907 (3d Cir. 1952), as follows: "It starts with an appraisal of the taxpayer's net worth situation at the beginning of a period. He may have much or he may have nothing. If, during that period, his expenditures have exceeded the amount he has returned as income and his net worth at the end of the period is the same as it was at the beginning (or any difference accounted for), then it may be concluded that his income tax return shows less income than he has in fact received. . . ."

wife had one savings account opened in 1957 with a deposit of $1.00, and showing deposits totalling $212.50 in 1958. During the tax years he purchased a living room set and a sofa. His wife owned a fur coat which in 1956 was six years old and various items of jewelry purchased from individuals at undisclosed prices. In terms of day-to-day living, he and his wife lived frugally, took no vacations except for weekends, and did no entertaining. He gave his wife money for the household which, as of 1962, would amount to $40-$45 a week for food.

As for cash on hand, appellant during the taxable years would have about $10,000, borrowed from several banks or loan companies at 8 per cent interest for financing his parimutuel betting. He would have on his person at any one time $300 to $400. These funds were not used for his personal needs. As appellant expressed it, "The money I borrowed from the banks I cannot touch for anything at all. It's used expressively (sic) to finance my horse betting at the tracks. . . . I cannot, in no way, touch that money, even to b y food, for I would be licking myself." At the beginning of 1956, he owed $3,300 on an outstanding loan. During the taxable years he received $13,770 and paid back $18,700 in connection with such loans.

One other source of funds was the subject of contradictory evidence. In 1948 appellant had loaned one Ralph Merola $15,000. Appellant's first version was that the last time he saw Merola, presumably in 1958, Merola gave him $3,000 in cash and some "hot" Canadian bonds which he destroyed, and that Merola's wife paid him between $6,000 and $8,000 in 1959. Appellant's second version was that in 1958 Merola, desiring to repay the loan—now $14,000—as well as $5,000 which appellant had advanced to the Internal Revenue Service for Merola, gave him an envelope containing Canadian bonds which appellant destroyed on ascertaining that they were stolen. This version made no refer-

ence to cash. A third version came from an accountant, Bevilacqua, who helped appellant on his tax returns. He said that $1,000 was paid appellant by Merola in 1956, $6,000 in 1957, around $2,000 in 1958, and that Merola's estate paid $8,000 in 1959. Still another source of confusion stems from the filing of a suit in court against Merola's estate in 1959 for $14,000, the amount of a note executed in 1956.

Against this background, the government introduced evidence of expenditures made and proceeds of loans received (except for the Merola loan) by appellant during the taxable years which resulted in the following totals:

	1956	1957	1958
Total cash expenditures	$29,840.41	$23,399.90	$17,004.02
Less: non-taxable receipts	14,122.40	9,170.00	—
Corrected adjusted gross income	$15,718.01	$14,229.90	$17,004.02
Less: exemptions	2,400.00	3,000.00	3,000.00
	$13,318.01	$11,229.90	$14,004.02
Less: deductions	1,000.00	1,488.14	1,251.83
Corrected taxable income	$12,318.01	$ 9,741.76	$12,752.19
Unreported taxable income	7,963.51	4,533.76	7,237.19

An accountant testifying for appellant presented his analysis which differed in two respects. He included as non-taxable receipts the $3,300 owed at the beginning of 1956 to a loan company, an additional $6,700 to bring appellant's total borrowings up to $10,000, a $1,000 payment by Merola in 1956, $6,000 in 1957, and $2,000 in 1958. He excluded from expenditures several items: food, Blue Cross, support of appellant's sisters, and two major payments for boat supplies.[5] The result was non-taxable receipts in excess of cash expenditures of $5,001.99 in 1956, $10,475.09 in 1957, and $9,136.73 in 1958.

[5] We discuss, *infra*, the grounds on which appellant sought to exclude this evidence, none of which we deem well taken.

Appellant's contention that there was a failure of proof in the government's case is, to follow his position as stated in his brief, ". . . that even assuming, *arguendo,* that the evidence adduced shows he spent more money during the indictment years than his reported gross income, there is not one scintilla of evidence to show that said expenditures came out of current receipts *only* and not out of available assets acquired in prior years. This is so because there is absolutely no competent evidence which, in any way suffices to clearly and accurately establish the extent of defendant's prior assets at the beginning of any or all the indictment years; i.e., there is no opening net worth for January 1, 1956, 1957 or 1958."

Appellant mistakes form for substance. In this case, the prosecution presented evidence to support the conclusion that the assets owned by appellant and his wife either remained at a static level, or instead increased over the taxable years, and in any event made no contribution to the expenditures shown. The jury was entitled to accept appellant's statement that he did not touch his loan proceeds for other than betting and to reject the testimony of payments received from Merola. There is no suggestion that cars, boats, furniture, jewels, or other property were disposed of to finance current purchases. The expense items excluded by appellant's accountant presented issues of fact which the jury obviously resolved against appellant.

This state of the proof fully satisfies the requirement in *Holland* v. *United States,* 348 U.S. 121, 132 (1954), of "the establishment with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets."[6] In a

[6] The government has also met the requirement that its proof accomplish the "effective negation of reasonable explanations by the taxpayer inconsistent with guilt." 348 U.S. at 135. Appellant has contended that "[t]here is no evidence in the record of any investigation as to available funds, despite the mention of vari-

typical net worth case, as *Holland,* precise figures would have to be attached to opening and closing net worth positions for each of the taxable years to provide a basis for the critical subtraction. In a cash expenditures case reasonable certainty may be established without such a presentation, as long as the proof—as in this case—makes clear the extent of any contribution which beginning resources or a diminution of resources over time could have made to expenditures. We recognize that courts occasionally blur the distinction between the two approaches and use language implying that they are subject not only to the same principle of excluding the availability of nontaxable resources but also to the same method of implementing that principle, i.e., establishing net worth figures. Appellant has cited several cash expenditure cases for the latter proposition. A careful review of the language used and the problems addressed in these opinions indicates that they cannot be fairly read as embracing such an inflexible formal requirement.[7]

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ous banks in the April 23, 1962 interview . . . .'' Three institutions were specifically named as having loaned appellant money from 1956 through 1960 and one other vaguely identified. One was the source of the government's evidence as to loans. A second was checked but defense objections to testimony by a government agent were sustained. There is not only no suggestion by appellant that any currently outstanding loans were ignored but, even if there were, his statement that such funds were untouchable for personal use renders insignificant any missing loan data.

[7] In *Olinger* v. *Commissioner,* 234 F.2d 823 (5th Cir. 1956), the prosecution had proven only that taxpayer had made stock purchases during the tax year. No proof whatsoever was introduced as to net worth. The court said, "the application of the cash expenditure method . . . with neither a head nor a tail to it will not do.'' *Id.* at 824 . We quite agree. There must be enough proof of both head and tail to rule them out as explanations of the expenditures. In *Dupree* v. *United States,* 218 F.2d 781 (5th Cir. 1955), the prosecution had ignored considerable evidence of the existence of sources of available funds at the beginning of the taxable period. It stated the requirement of "a listing of all the assets'', equated "opening net worth'' and "available funds in the sense ordinarily used'', and said: "The first element

In the case at bar it is apparent that while the jury may not have been apprised of the dollar value of each of the assets comprising appellant's opening net worth, it was so informed as to his cash on hand and the few non-liquid items which were disposed of or acquired during the course of each prosecution year. A running series of net worth statements would not have added to the jury's understanding. We therefore hold that the proof adduced here was sufficient to allow the jury an intelligent determination of the single relevant issue: whether any expenditures found to be in excess of reported income can be accounted for by assets available at the outset of the prosecution period or non-taxable receipts during the period. *United States* v. *Johnson,* 319 U.S. 503 (1943).

Rulings at Trial

Appellant complains that the trial court erred in refusing to declare a mistrial following the Assistant United States Attorney's prejudicial reference in his closing ar-

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that must be established in this type of prosecution is what funds are available to the taxpayer at the opening date of the prosecution year. In this respect it is similar to a so-called 'net worth' case. If there is no established figure showing the source from which expenditures during the year can be made, or the complete lack of such a source, then there is no relevance to proof of expenditures during the year . . . ." *Id.* at 784. Again we agree but do not assume that this language restricts proof to a formal net worth statement so long as sources of available funds are identified and quantified. In *United States* v. *Caserta, supra* n. 4, the court refers to "an appraisal of the taxpayer's net worth situation at the beginning of a period" and the need to account for any subsequent changes. Here, too, we see no intimation that these objectives can be accomplished only through formal net worth statements. Finally, in *Ford* v. *United States,* 210 F.2d 313 (5th Cir. 1954), *cert. denied,* 352 U.S. 833 (1956), the court refers to the necessity for "a satisfactory starting point" and, reviewing prosecution evidence similar in nature to that in this case, declared the requirement satisfied. So far as the opinion discloses, no formal net worth statements were used, the evidence as to the "starting point" coming from testimony of the I.R.S. special agents who reported on their investigation.

gument to the war in Viet Nam and again when he commented on hearsay evidence excluded during the trial.

To be sure, even though defense counsel intimated that the government agents were not disinterested witnesses, it was highly improper for the prosecution to describe them as laboring "for the United States Government in order to protect the taxpayers from people who are cheating on their income tax, to get the dollars and cents we need in the till to fight Communism, to fight the war in Viet Nam...." *See Viereck* v. *United States,* 318 U.S. 236, 247-48 (1943); *Greenberg* v. *United States,* 280 F.2d 472, 474 (1st Cir. 1960). Unlike *Viereck* and *Greenberg,* however, the court below promptly instructed the jury to disregard the argument and emphasized that it was to decide the case on the evidence alone without regard to "any appeal to Viet Nam and any other federal problem". We cannot say that the U. S. Attorney's remarks in a trial as lengthy as this were of a kind the jury could not put out of its mind after having been told to do so. *Az Din* v. *United States,* 232 F.2d 283, 285-86 (9th Cir.), *cert. denied,* 352 U.S. 827 (1956). Nor do we consider the government's case so weak that the court's curative instruction was insufficient. *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 237-240 (1940). As for the government's improper reference to hearsay evidence, we hold the court's timely instruction to disregard likewise sufficient. *Cf. Kitchell* v. *United States,* 354 F.2d 715, 719 (1st Cir.), *cert. denied,* 384 U.S. 1011 (1966).

Appellant also alleges error in the court's allowance into evidence of portions of testimony from pre-indictment I.R.S. interviews. He asserts their inadmissability because the government failed, prior to each interview, to give him all of the *Miranda* warnings, *viz,* to notify him of his right to counsel, and because the information he disclosed at those sessions was not given voluntarily but was "tricked"

out of him. We have now on several occasions stated our views as to the applicability of *Miranda* at I.R.S. office interviews. *Spinney* v. *United States,* 385 F.2d 908 (1st Cir. 1967), *cert. denied,* 390 U.S. 921 (1968); *Morgan* v. *United States,* 377 F.2d 507 (1st Cir. 1967); *Schlinsky* v. *United States,* 379 U.S. 735 (1st Cir.), *cert. denied,* 389 U.S. 920 (1967). Our conclusion was and is that the *Miranda* requirements do not extend to that kind of activity.[8]

Counsel argues, however, citing *Morgan,* that our decided cases do not control the situation before us here since appellant was "tricked into giving information about years he did not believe were under investigation." Even had appellant been in custody, *Flaherty* v. *United States,* 355 F.2d 924 (1st Cir. 1966), vacated on other grounds, 390 U.S. 202 (1968), we do not see any evidence that appellant was the victim of fraud or trickery. The October 6, 1961 interview was statedly held to discuss appellant's income tax for the years 1959 through 1960. The interview was, in all important respects, confined to questions relating to those years. Moreover, he was informed that anything he might say could be used against him at "any proceedings which may hereafter be undertaken by the United States." Finally, at the April 23, 1962 interview appellant, in addition to being advised again of his right not to answer, was told that the Internal Revenue Service was conducting an official investigation of "your income tax returns" with no dates supplied. This sequence suggests to us the natural evolution of an investigation rather than a preconceived plan to give a misleading notice as to the years 1959 and

[8] *Cf. Mathis* v. *United States,* 36 U.S.L.W. 4379 (May 6, 1968), where the Supreme Court held that *Miranda* does extend to an individual already in jail who is "interviewed" by I.R.S. agents about tax matters, however unrelated they may be to the offense for which he is in custody.

1960 and then inquire about earlier years. Had this been the motive, we see no reason for the narrow scope of the first interview.

We next consider appellant's argument that certain expenditure figures produced by the government were improperly allowed into evidence. Specifically, appellant alleges error in the admission of certain business records of Ideal Windlass Co., a marine equipment supplier with whom he did business; in the admission of his Blue Cross rate card on which were recorded itemized cash payments; and in the admission of food and household expense figures based on answers he gave at one of the pre-indictment I.R.S. interviews.[9]

Use of the Ideal Windlass records is challenged on the ground that the initials "F.M." appearing beside all but a few cash payment entries made during 1957 and 1958 to an account opened in the name of Frank Moretti, appellant's brother-in-law, and only later changed to read "L.T.", suggest that Moretti and not appellant was the source of some $3,200 worth of expenditures alleged by the government to have been made by appellant for boat supplies. On review we cannot say it was error to have admitted the records. The ledger account in 1956 carried both names, Moretti's in parentheses following appellant's. The change of name on the account records for 1957 and 1958 could be taken to be a correction intended to reflect the actual charge customer. The initials "F.M." next to payment entries might well mean that while Moretti physically made the payments he did so on behalf of and with funds provided by appellant. Indeed, it was appellant and not Moretti who owned the boat for which these supplies were purchased. And Moretti, when he took the stand,

[9] We consider appellant's claimed error with respect to the admission of testimony bearing on support payments for dependents together with the requested instruction on the same matter, *infra*.

could not remember whether he made the payments attributed to him even though some were substantial. This background convinces us that it was within the discretion of the court to admit into evidence the Ideal Windlass records and that it was for the jury to decide if the recorded cash payments were made by appellant or someone else.

So, too, with the Blue Cross and food and household expense figures. As to the former, the jury could have concluded that while there is no direct evidence indicating who made the insurance payments credited to appellant's rate card—appellant himself, his employer, or another—the reasonable inference is that they were made by appellant directly. This is especially so since appellant listed himself as unemployed at the time he applied for coverage, did not participate in a group plan, and allowed his policy to lapse for three months. As to the latter, the jury could have concluded from appellant's statement made during a 1962 I.R.S. interview that he "gives" his wife about $40 or $45 a week, that his household expenses ran in those figures during the earlier prosecution years as well. This is especially so since in describing the system he and his wife used to pay bills appellant more than once spoke in the imperfect tense, suggestive of repeated or customary action over a period of time in the past.

Appellant also asserts error in the failure of the court below to charge the jury in accordance with certain requested instructions. Our preceding discussion disposes of some of his claims. Others we find to be wholly without merit. We will limit our remarks here to the few which we think deserve comment.

First is the requested instruction that the alleged expenditures for dependent support must be disregarded. The sum of $768 was charged against appellant for each of the prosecution years 1957 and 1958 as the amount ex-

pended for the support of a dependent sister. The government derived this figure from a Form 2038 filed by appellant in 1958 in which he stated that he expended the following amounts in behalf of his sister: food, $461; clothing, $100; shelter, $150; medical, $50; and other, $50. Appellant argues that these figures should not have been used against him in either year since they represent a proportional share of expenses already reported by him or charged to him and that their inclusion in this context constitutes double-counting. Alternatively, he argues that the figure should not have been used in 1957 since no itemized Form 2038, evidencing the extent or nature of his expenditures, was appended to his return for that year.

With respect to the double-counting issue, we think it not unfair that where, as here, the government produces evidence of expenditures which are particularly within the knowledge of a defendant, the burden of coming forward with more precise information shifts to the defendant. *See Siravo* v. *United States*, 377 F.2d 469, 473 (1st Cir. 1967). Appellant has not sustained this burden; all he did below was to raise the issue.[10] In any event the largest stipulated expense—$461 for food—was presumably not part of appellant's general food expenditure since a sister was a dependent for only two years while his estimated family food expense, stated in general terms, apparently reflected costs over a period of years. And since one sister was

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[10] For example, the only detailed evidence for clothing purchases in 1958 indicated that the items bought were boys' clothing. In view of the total clothing expenditures—averaging $212 a year over the three year period for appellant, his wife, and his two sons—it was a fact question whether the listed "clothing" expense was accounted for by the clothing store charge account records already introduced in evidence. Appellant made no effort to show that it was so accounted for. Likewise, it is not clear that the listed "shelter" expense represents a percentage of the mortgage payments. It may have referred to some other expense such as fixing up or maintaining quarters within appellant's home for his dependent sister.

living in his house in 1957 and another in 1958 it is not unreasonable to charge him with expenditures at least in the amount of $461 for that year as well. The difference in each year between $461 and $768, assuming that difference was improperly charged against appellant, was de minimis in view of the substantial underreporting of income.

A second requested instruction was that where facts or circumstances are susceptible to two reasonable inferences, one of which points to innocence and the other to guilt, the jury must acquit the defendant. Of this we need only say that the Supreme Court, addressing this matter, has concluded otherwise. "[T]he better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect . . . ." *Holland, supra* at 139-40. The jury was so properly instructed.

Another requested instruction was that "[f]or each of the indictment years, the government must prove beyond a reasonable doubt, not only that the expenditures of the taxpayer exceeds (sic) the amount he returned as income; but also must prove that his net-worth at the end of each year is higher than, or at least equal to, his net-worth at the beginning of the year." As an abstract statement of the law, this is not accurate. The prosecution can still make out a cash expenditure case even though a taxpayer's net worth at the end of the year was less than at the beginning, provided that this decrease was not enough to equal or exceed the difference between reported income and nontaxable receipts during the year on the one hand and total expenditures on the other. The court was not obliged to accede to such request.

Appellant preserved his objections to the court's refusal to grant his requested instructions, and objected specifically to several portions of the court's instructions. He

made no objection to the part of the charge involving the issue raised by his own request.[11] Even were we to consider that Fed. R. Crim. P. 30 had been complied with, we would find no error under the circumstances of this case. While the court's instruction confined the exculpatory explanations for appellant's expenditures to "non-taxable receipts, such as . . . loans", there was no suggestion in the record that there were available nontaxable resources other than the proceeds of loans made to appellant or repayments to appellant of the Merola loan, both of which were adequately covered by the court's language. Any reference to the influence of other assets on hand at the beginning of the taxable period or diminution of net worth would have no support in the record. Under these circumstances the court's instruction was not error. *Pacheco* v. *United States*, 367 F.2d 878, 880-81 (10th Cir. 1966); *Davis* v. *United States*, 226 F.2d 331, 336 (6th Cir. 1955), *cert. denied*, 350 U.S. 965 (1956).

Wiretapping and Surveillance

Appellant also alleges error in the district court proceedings following our remand after conviction to determine whether or not, upon an examination of facts relating to a disclosure by the government that certain of appellant's business telephone conversations had been monitored as part of a general surveillance of the activities of

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[11] The court's instruction was as follows:

"In determining whether or not said expenditures, if in fact they were made by the defendant as claimed by the Government, were made from taxable income and not from nontaxable receipts, you should consider whether the Government has run down all the reasonable leads suggested to its agents tending to establish the defendant's innocence and explored any explanations advanced by him during the investigation as to the sources of non-taxable receipts by him, such as loans. If you are satisfied that all such reasonable leads and explanations have been exhausted or refuted, this may be persuasive evidence to consider in determining whether or not said expenditures represent taxable income."

his employer, appellant's conviction should stand or a new trial should be ordered.

To begin with, it is asserted that the district court erred in denying a defense motion to return the case to this court in light of a further disclosure by the government, made subsequent to remand but before hearing, that an attorney-client conversation involving appellant was among those overheard by F.B.I. agents. In our first consideration of this matter we were persuaded that *Black* v. *United States,* 385 U.S. 26 (1966), the only one of what are now four cases dealing with the question of remand versus automatic new trial in surveillance situations, was distinguishable from this case and its mandate ordering a new trial inappropriate. *Black* involved monitored conversations between petitioner and his attorney about matters then before the grand jury and which eventually ripened into trial and conviction. The conversation was admittedly communicated by the F.B.I. to the revenue agents who were working on the case. While we were of the belief that here there was not the slightest intrusion into an attorney-client relationship, our decision to remand was not governed by that fact alone for we said of *Black* that "not only do we find great emphasis on the interference there with the attorney client relationship, but we find considerable reason for supposing that this was a matter of particular importance." We went on to indicate what we considered the real nemesis: "subtle benefits that might consciously or unconsciously accrue to the government in knowing the planned procedure, or even the state of mind of the defendant and his counsel *with respect to the trial,* quite apart from hearing affirmative evidence, or leads to evidence." (emphasis added) Thus, the fact of monitoring an attorney-client conversation without more—specifically, without a concession that the matter discussed involved the alleged offense in question—neither required automatic retrial

nor, in the circumstances of this case, compelled the district court to return the matter to us without rehearing.

The cases following *Black* do not suggest otherwise. *O'Brien* v. *United States*, 386 U.S. 345 (1967), in which the Court also ordered a new trial, likewise involved eavesdropping on a conversation between petitioner and his attorney about the controversy in question and is in this respect no different from *Black*. While it appears that there, unlike in *Black*, neither the fact nor substance of the conversation was communicated to prosecuting attorneys for the Justice Department, we do not interpret this to mean that one isolated illegal intrusion on attorney-client conversations on matters demonstrably separate from the instant proceedings automatically requires a new trial.

Granello v. *United States*, 386 U.S. 1019 (1967), decided after *O'Brien*, offers affirmative support for this interpretation. That case, in which the Court denied a petition for a writ of certiorari, involved monitored conversations between petitioner and attorneys representing him in matters other than the income tax charge leading to his conviction and appeal. While it does not appear that the attorneys whose conversations were overheard were the same attorneys who represented petitioner in the immediate controversy, as is the case here, it is nevertheless significant that the Court chose not to apply *Black* and *O'Brien* where it was perfectly clear that the tainted conversations bore no relation whatever to the offense charged.

To the extent that the district court in a situation like that here can determine, after hearing, whether or not the subject matter of the overheard attorney-client conversation involved the legal charge at bar, remand and not retrial is, at least initially, the appropriate course.[12] We

[12] We do not read *Hoffa* v. *United States*, 387 U.S. 231 (1967), as requiring any other disposition. The Court did distinguish *Black* and *O'Brien* by stating that unlike those cases, "[t]here was [in

think the wisdom of this course is illustrated by this case. The district court, after a detailed examination of records and a protracted hearing, concluded that no evidence or leads affecting appellant's trial were generated by the electronic surveillance. 274 F. Supp. at 226.

The evidence, viewed from any facet, justified the court's conclusion. The surveillance of a place of business of one of appellant's associates took place between March 6, 1962 and July 12, 1965. Daily logs and tapes would go to a special agent of the F.B.I. in Boston who would dictate a memorandum or simply a teletype message for Washington F.B.I. headquarters. No dissemination of any such information was made to the Internal Revenue Service in Washington or anywhere else. The Internal Revenue agents and the U. S. Attorneys working on appellant's case had no knowledge of the existence of the information. The district court's conclusion does not rest merely on testimony of lack of knowledge. The court also found that the basic work papers and report on appellant's case were completed on March 5, 1962, one day before the surveillance commenced. These papers contained either the evidence or the leads to evidence for every item of proof presented by the government at trial—except appellant's own estimate of his expenditures for food in the April 23, 1962 interview.

Insofar as the single conversation overheard between appellant and his attorney is concerned, the brief reference to appellant's being asked by the attorney if he would sign a form "I.R.S. wants" relates to a waiver of the statute of limitations (Form 872) for the tax year 1961.

Hoffa] apparently no direct intrusion . . . into attorney-client discussions.'" *Id.* at 233. Viewing *Hoffa* in the light of *Granello*, we read "direct intrusion" as an intrusion relevant to the current prosecution. Otherwise, an illegal wiretap on a conversation between a taxpayer and his attorney relating, for example, to a domestic relations problem would guarantee him a new trial in any criminal prosecution.

The attorney was relaying a request of the I.R.S. to appellant on a civil matter for a later year than those involved in this case. The information as to this call was not even reported to Washington F.B.I. headquarters. Only if intrusion of a conversation between attorney and client requires retrial as a matter of law—which we do not think to be the law—could this conversation be deemed a ground for retrial.

Appellant, however, asserts on procedural grounds that this finding cannot stand because it is a judicial determination based upon an inadequate factual record, necessarily made so by the court's refusal to compel the government to produce all of its records relating to the surveillance of appellant's employer at the latter's place of business (irrespective of whether or not appellant was a participant in any given monitored conversation).

Subsequent to remand but before hearing appellant moved for discovery and inspection of all tapes, log summaries, interpretive reports, names and addresses of participating government agents and employees and all interdepartmental correspondence arising out of and relating to the surveillance of appellant's business associate. The court ordered production of all logs, airtels, and memoranda of conversations to which appellant was a party and disclosure of the names, addresses and status of all government agents who prepared or participated in the operation of the surveillance.

We do not understand appellant to argue that he has a right to inspect logs or memos of conversations in which he was not a participant. Indeed, that point he wisely conceded before the district court. His claim, rather, is that because so many of the records to which he was given access demonstrate a lack of certainty on the part of the government as to the identity of all parties to various monitored conversations, he can be assured of knowing if some of the doubtfuls were in fact himself, and then

whether the subject matter discussed related to his case, only by a full inspection of everything.

There is no question but that some logs evidenced indefiniteness and that certain airtels indicated that appellant's name had been filled in where doubt existed. The government explained, however, and convincingly so, that while the monitors were not always themselves familiar with appellant's voice, so that there were blanks or questions in their reports, Special Agent Kehoe, to whom the logs and tapes were sent each day, upon listening to each tape could and did make certain identification of appellant in every instance where he was a party to an overheard conversation. The court examined all of the unproduced papers *in camera* and, agreeing with the government, concluded that none of them involved conversations in which appellant participated or were in any other way relevant to the instant case.[13] Appellant argues that it was improper procedure for the court to have made an *in camera* inspection, but cites to us no persuasive authority to support his position.[14] His claim is that he has demonstrated a "strong showing of necessity" for production which, for

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[13] While the court had to rely on the accuracy and honesty of Agent Kehoe in concluding that no recorded conversation involved appellant, it was not dependent on any agent for its conclusion that no conversation which it reviewed related to the case. We see no potential for prejudice in the possibility that some conversations involving appellant, but having nothing to do with the case, may have been misidentified. A finding of unrelatedness was by definition a judgment that matter was extraneous, not that matter arguably relevant lacked any usefulness to appellant. *See Dennis* v. *United States, infra.*

[14] Characterizing his request for production as pretrial discovery of illegally monitored conversations, appellant relies principally upon *United States* v. *Coplon,* 185 F.2d 629 (2d Cir. 1950), *cert. denied,* 342 U.S. 920 (1952), for the proposition that *in camera* consideration was improper. *Coplon,* however, involved the wiretapping of an accused's home and office telephones and all monitored conversations included her as a participant. The Second Circuit held that it was error for the judge to have read the

purposes of analogy we translate as "particularized need". *See Dennis* v. *United States,* 384 U.S. 855, 874 (1966). Yet a reading of such a case as *Dennis,* involving a conspiracy fraudulently to obtain the services of the National Labor Relations Board, suggests that appellant has not established the kind of need which requires automatic disclosure and forecloses *in camera* inspection. There the Court ordered production of grand jury minutes recorded some seven years prior to trial so that defendant could evaluate the consistency of testimony of certain prosecution witnesses for impeachment purposes. While stating on the narrow issue before it that "it is [not] realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities", 384 U.S. at 874-75, the Court said more generally:

> "'The determination of what may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this regard is limited to deciding whether a case has been made for production, and to supervise the process: for example, to cause the elimination of extraneous matter....'" *Id.* at 875.

We see the *in camera* function of the district court here as nothing more than such an exercise in eliminating "extraneous matter". To engage in this procedure was especially appropriate since the government has a substantial interest in preserving the secrecy of its investigation of organized crime, the subject of the surveillance in question.

Affirmed.

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records *in camera* to determine whether or not the taps led to any evidence introduced at trial. In our case the purpose of the *in camera* review was not to determine whether any evidence was tainted by the surveillance but to determine whether any of the records not already produced for appellant's use involved him as a party so that they should have been produced.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6829.

LOUIS J. TAGLIANETTI,
DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,
APPELLEE.

MEMORANDUM AND ORDER

January 17, 1967

Per Curiam. The only question in connection with this motion is whether the facts asserted in the government's motion to remand fall within *Black* v. *United States,* 1966, 385 U.S. 26, requiring an automatic retrial, or whether the procedure requested by the government and approved in *United States* v. *Shotwell Mfg. Co.,* 1957, 355 U.S. 233, should suffice. The government contends that *Black* is distinguishable, principally because in the present case there were not overheard any conversations between the defendant and his attorney. It we accept the view of the dissenters as to what the Court decided in *Black,* this would be a distinction without a difference.

With great respect, we do not feel that what was involved or decided in *Black* is necessarily what the dissenters as-

sert. If the Court wished to make a broad, unlimited pronouncement, it could easily have done so. We have examined the record and briefs that were before the Court, and not only do we find great emphasis on the interference there with the attorney client relationship, but we find considerable reason for supposing that this was a matter of particular importance. The defendant well pointed out the subtle benefits that might consciously or unconsciously accrue to the government in knowing the planned procedure, or even the state of mind of the defendant and his counsel with respect to the trial, quite apart from learning affirmative evidence, or leads to evidence. This benefit might never be discoverable in the cold record of a separate hearing. On a full retrial, at a minimum, the defendant would know from the start the government's thinking just as well as the government would know his, which would at least even the balance.

In the case at bar no such overtones are asserted, but plain questions of fact which should be definitely resolvable, one way or the other, by the district court in a separate hearing. We remand the case for the limited purpose requested by the government in its motion, but with the cautionary instruction that if the court is in doubt as to its ability, as the evidence develops, to resolve the matter as clearly as it could were a complete new trial granted, it may, and should, order such a new trial forthwith.

By the Court:
ROGER A. STINCHFIELD, *Clerk*

By: (s) DANA H. GALLUP
Chief Deputy Clerk

[Cert. cc: Clerk, U.S.D.C., R.I.; cc: Messrs. Varone, Faerber and Rogovin.]

Appendix C

26 U.S.C. §7201.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

18 U.S.C. §3500.

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony

of the witness, the court shall order the United States to deliver such statement for the inspection of the court *in camera*. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital or an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."